



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 43 OF 2016

JOHNSON MUENDO WAITA.....APPELLANT

VERSUS

ODILLAH MUENI NGUI.....RESPONDENT

(An appeal from the original judgment and decree of Hon. M. M. Nafula (SRM) delivered on 11th May, 2016 in Tawa Senior Resident Magistrate's Court Case No. 169 of 2014)

JUDGMENT

The Appellant herein was the 1st Defendant in the original trial, where he was sued by the Respondent who sought damages for malicious prosecution. The learned trial magistrate in a judgment delivered in the Respondent's favour on 11th May 2016, made an award of special damages of Kshs 82,970/=, and general damages of Kshs 500,000/= to the Respondent.

The Appellant being dissatisfied with the said judgment filed the present appeal by way of a memorandum of appeal dated 16th May 2016, on the following grounds:

1. The trial magistrate erred in law and fact when she failed to appreciate that the Respondent failed to prove her case to the required standard of proof.
2. The trial magistrate erred in law and fact when she found malice where none had been established against the Appellant.
3. The trial magistrate erred in law and fact and misdirected herself when she relied on extraneous matters to enter judgment in favour of the Respondent.
4. The trial magistrate erred in law and fact when she made an exorbitant award which was not justified to the Respondent.
5. The trial magistrate misdirected herself on matters both law and fact that she occasioned a miscarriage of justice against the Appellant.

The Appellant is praying for orders that the appeal be allowed, the whole of the judgment delivered 11th May 2016 be set aside, and that the trial suit stands dismissed. In addition that Appellant seeks to be paid costs of the appeal and those of the trial Court as against the Respondent.

The Facts

The Respondent filed a Complaint filed in the trial Court dated 23rd July 2014, and averred therein that on various occasions between 26th December, 2012 and 31st December, 2012, the Appellant falsely and maliciously laid a false claim against her to the effect that the Respondent had trespassed on his farm, as a result of which she was arrested in public and locked up in police cells for at least 6 hours and later arraigned in court on 21st February, 2013.

Further, that she was charged in Tawa SRM CRC No. 55 of 2013 with the offence of malicious damage of property, and later faced a second charge of trespass with intent to annoy and the two cases were consolidated. She averred that she continued to attend court and was later acquitted under section 215 of the Criminal Procedure Code.

The Respondent stated that as a result of the said prosecution, she engaged the services of an advocate and had to attend court for hearing on several occasions with her witnesses. She thereby suffered loss and damages as she had to pay for fare, lunch, breakfast and subsistence, and

could not take care of her business as usual. She also averred that her reputation as a teacher was tainted. She sought special damages for advocates fees at Kshs. 65,000/=, transport at Kshs. 15,430/=, and disbursement on proceedings and judgment at Kshs. 2,540/=, which totaled Kshs 82,970/=.

The Respondent's testimony in the trial Court was that the Appellant was the complainant in Criminal Case No. 55 of 2013, and that she was arrested by a police officer called Mavo and taken to Mbooni police station, where was put in the cell for 6 hours and later released on a cash bail of KShs. 10,000/=. She was later tried and acquitted. She produced proceedings to the criminal case as her Exhibit 1 and charge sheet as Exhibit 2.

She further testified that she hired an advocate and used to pay witnesses, and that she spent KShs. 82,970/= on the criminal case. PW1 produced receipts to that effect as her Exhibit 3. She stated that her reputation was tainted considering that she is a Government employee. She stated that no one testified that they saw her in the Appellant's farm. On cross examination, she acknowledged that there had been disputes on the subject land.

The Appellant filed a statement of defence in the trial Court in which he admitted the Respondent's averments that he lodged a complaint with the police, but denied those alleging malice and the loss. He testified that on 26th December, 2012 he saw Mutuku Munyao digging coffee holes in the farm. When asked why he was doing so, he said that he had been sent by the Respondent's husband. Further, that the Appellant was called upon by his sister who saw the Respondent and her daughter in the farm cutting cassava. That on 28th December, 2012 he made a report to Mbooni Police Station, and the police wrote to the lands officer and the Agricultural officer to visit the site. Further, that the said officers found the cassava had been damaged.

On cross examination, he stated that the land belonged to his parents and acknowledged that his parents were not complainants in the criminal case. He stated that he was called and told that the Respondent and her daughter were cutting cassava but did not witness it.

The Determination

The Appellant and Respondent canvassed this appeal by way of written submissions. The Appellant's Advocates, P.M, Mutuku & Co. Advocates, filed submissions dated 30th October 2017, while the submissions filed by Respondent's Advocates, J. A Makau & Company Advocates, are dated 11th January 2018.

From the grounds of, and relief sought in this appeal, and the submissions made thereon by the parties, it is evident that the Appellant is contesting the findings of the trial Court on liability and quantum of damages. The issues then before this Court are whether there was malicious prosecution of the Respondent by the Appellant, and secondly if so, whether the trial magistrate applied the correct principles of law in assessing the damages payable to the Respondent.

On the first issue, it was the Appellant's submission that the prosecution and the police did not handle the complaint professionally, and that as a result, shoddy investigations were carried out that resulted in the acquittal of the Respondent. It was argued that the mishaps and non-performance of the prosecution should not have been visited upon the Appellant. It was further argued that after the complaint had been lodged, the matter was in the control of the police who took up investigations and deemed it fit to prefer a charge. In this regard the Appellant cited **Jadiel Nyaga v. Silas Mucheke, Nyeri Civil Appeal No. 59 of 1987** (unreported). It was submitted that the elements needed to prove a case of malicious prosecution enunciated in **Mbowa v. East Mengo District Administration [1972] EA 352** were not proved by the Respondent.

The Respondent submitted that the Appellant was unable to prove his case, thereby an inference be made that the same was actuated by malice. It was argued that none of the Appellant's witnesses saw the Respondent damage the subject farm as alleged, and that the subject land was registered under the names of PW8 and her husband Gedion Waita who did not lodge the complaint. That due to the foregoing, the complaint was malicious and in bad faith and the Appellant cannot shift the blame to the police officers and investigating officers.

The essentials ingredients of malicious prosecution were discussed in **Murunga vs the Attorney General (1979) KLR 138** as follows:

- a) A prosecution instituted by the defendant or by someone for whose acts he is responsible.
- b) Termination of the prosecution in the Plaintiff's favour.
- c) The prosecution is instituted without reasonable or probable cause.
- d) The prosecution is actuated by malice.

Also see **Mbowa vs. East Mengo District Administration [1972] EA 352** and **Gitau vs. Attorney General [1990] KLR 13**

In the present appeal, it is not disputed that the Respondent was arrested and by the police, locked in the police cells for six hours and charged in court. It also not disputed that her prosecution was premised on a complaint made by the Appellant, and ended in the Plaintiff's favour as she was acquitted under section 215 of the Criminal Procedure Code.

On whether the making of the said complaint by the Appellant was malicious, the law is clear that the mere fact that a person has been acquitted of the criminal charge does not necessarily connote malice on the part of the prosecutor. As was held in **James Karuga Kiiru vs. Joseph Mwamburi and 3 Others, Nrb C.A No. 171 of 2000** to prosecute a person is not *prima facie* tortious, but to do so dishonestly or unreasonably.

In the present case, the circumstances from which the court can deduce that the arrest and arraignment of the Respondent was probably unreasonable, was the fact that the Appellant was not the owner of the land that gave rise to the complaint and prosecution, and the fact that it came out during the evidence adduced in the said criminal proceedings that there was already an existing land dispute between the Respondent's and Appellant's families. I therefore find that the Respondent was maliciously prosecuted and is entitled to damages.

On the damages awarded, the Appellant submitted that the trial court was misguided in its awards. Citing **Thomas Bursoboo Bisembe v. Commissioner of Police and Hon. Attorney General Nairobi**, [2013] eKLR, it was submitted that it was erroneous for the court to have compared detention of over 6 months with a detention for 6 hours in cells. It was further submitted that the receipts in respect of special damages were neither coordinated or serialized, and that the figures were exorbitant.

The Respondent on the other hand submitted that the award of Kshs. 500,000/= was sensible.

The general principle is that the assessment of damages is within the discretion of the trial court, and an appellate court will only interfere with quantum of damages where the trial court either took into account an irrelevant factor or left out a relevant factor, or where the award was too high or too low as to amount to an erroneous estimate, or where the assessment is not based on any evidence (see **Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another** [1982-88] 1 KAR 727, **Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012** [2014]eKLR and **Bashir Ahmed Butt v Uwais Ahmed Khan** [1982-88] KAR 5).

The considerations to be taken into account in an award of damages for malicious prosecution were discussed in the Uganda case of **Dr. Willy Kaberuka vs. Attorney General Kampala** ,HCCS No. 160 of 1993 as follows:

“The plaintiff suffered injury to his reputation.He must have suffered the indignity and humiliation. He is also entitled to recover damages for injuries to his feelings especially the possibility of serving a sentence...There are no hard and fast rules to prove that the plaintiff's feelings have been injured or that he has been humiliated as this is inferred as the natural and foreseeable consequence of the defendant's conduct. The plaintiff's status in Society is also a relevant consideration and for all these reasons the plaintiff is entitled to damages...A plaintiff who has succeeded in his claim is entitled to be awarded such sum of money as will so far as possible make good to him what he has suffered and will possibly suffer as a result of the wrong done to him for which the defendant is responsible”.

I however find that the decision that was relied upon by the Respondent of **iThomas Bursoboo Bisembe v. Commissioner of Police and Hon. Attorney General (supra)** , is not comparable as the Plaintiff therein was in police custody for 6 months, which was a consideration in the award of general damages of Kshs 500,000/= made in that case. In the present case the Respondent was in police custody for 6 hours, and an award of Kshs 500,000/= as general damages is therefore excessive. I find that an award of Kshs 300,000/= as general damages would have been reasonable in the circumstances of the case.

Lastly, the award of special damages of Kshs 82,970/= was proved by receipts, and the Appellant did not bring any evidence in the trial Court to show that they were forgeries as he alleged in his submissions.

The Appellant's appeal therefore only succeeds to the extent that the award of general damages was excessive in the circumstances of the case. I accordingly set aside the judgment of the trial court and substitute it with a total award of damages of Kshs 382,970/= to the Respondent, which has been computed as follows:

(a) General damages	Kshs 300,000/=
(b) Special damages	<u>Kshs 82,970/=</u>
Total	<u>Kshs 382, 970/=</u>

The Appellant shall meet the costs of the trial court proceedings and of this appeal.

It is so ordered.

DATED AT MACHAKOS THIS 8TH DAY OF MARCH 2018.

P. NYAMWEYA

JUDGE